IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BEMUS G. JACKSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL ACTION NO. SA-01-CA-662-FB**
	)	
U.T.H.S.C. POLICE DEPARTMENT,	)	
	)	
Defendant.	)	

ORDER ACCEPTING MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court is the Memorandum and Recommendation of the United States Magistrate Judge (docket no. 21) and plaintiff's written objections thereto (docket no. 23).

Where no party has objected to a Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of the Memorandum and Recommendation. See 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the Memorandum and Recommendation and determine whether it is clearly erroneous or contrary to law. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir.), cert. denied, 492 U.S. 918 (1989).

On the other hand, any Memorandum and Recommendation to which objection is made requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. Battle v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987).

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The Court has thoroughly analyzed the plaintiff's submission in light of the entire record. As required by Title 28 U.S.C. § 636(b)(1)(c), the Court has conducted an independent review of the entire record in this cause and has conducted a de novo review with respect to those matters raised by the objections. After due consideration, the Court concludes plaintiff's objections lack merit.

Plaintiff alleges his former employer, the University of Texas Health Science Center at San Antonio Police Department, discriminated against him because of his age in violation of the Age Discrimination in Employment Act ("ADEA"). As the Magistrate Judge discusses, the United States Supreme Court has held that the ADEA does not validly abrogate the states' Eleventh Amendment immunity from suit by current or former state employees against their state employers. See Kimel v. Florida Bd. of Regents, 528 U.S. 62, 92 (2000). Kimel is particularly similar to this case because it also involved plaintiffs who filed suit under the ADEA alleging that the state universities which employed them had discriminated against them on the basis of their age. Id. at 69-71.

Plaintiff cites Pederson v. Louisiana State Univ., a Fifth Circuit case decided shortly after the Supreme Court issued its decision in Kimel. 213 F.3d 858 (5th Cir. 2000). Plaintiff argues that Pederson controls because it is the later decided case. However, lower courts are compelled to follow directly controlling Supreme Court precedent unless and until that Court speaks to the contrary. See Hopwood v. Texas, 236 F.3d 256, 274 (5th Cir. 2000), cert. denied, 121 S. Ct. 2550 (2001). Thus, the Kimel decision is binding precedent upon this Court.

Moreover, Pederson involved a Title IX cause of action alleging gender discrimination in the provision of facilities and teams for intercollegiate athletic competition. 213 F.3d at 864. Title IX does not apply to age discrimination claims. See 20 U.S.C. §§ 1681, 1684 (prohibiting federally-funded educational institutions from discriminating on the basis of gender or blindness). Nor does

it apply in the employment context. Lakoski v. James, 66 F.3d 751, 753, 758 (5th Cir. 1995) (Title IX creates no private right of action for employment discrimination).

As a matter of law, defendant, as a state agency, is entitled to assert Eleventh Amendment immunity, and because plaintiff has not shown that defendant has waived that immunity, and the Supreme Court has expressly found that such immunity has not been abrogated by Congress, plaintiff's ADEA claim fails for lack of subject matter jurisdiction. See Kimel, 528 U.S. at 78-92.

This does not mean plaintiff has no right of recovery. As the Supreme Court stated in Kimel, plaintiff may have a remedy at state law. Id. at 91-92. The Court explained:

> Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.* Those avenues of relief remain available today, just as they were before this decision.

Id. (referencing state statutes via asterisk (*), including TEX. LAB. CODE ANN. § 21.001 et seq.)

IT IS ORDERED that the Memorandum and Recommendation of the United States Magistrate Judge (docket no. 21) filed in this cause is ACCEPTED pursuant to 28 U.S.C. § 636 (b) (1) such that defendant's motion to dismiss under FED. R. CIV. P. 12(b)(1) (docket no. 5) is GRANTED. The above-styled and numbered cause is DISMISSED. Motions pending with the Court, if any, are denied.

It is so ORDERED.

SIGNED this 16 day of March, 2001.

FRED BIERY
UNITED STATES DISTRICT JUDGE